IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 73.

THE FIRST NATIONAL BANK OF JACKSBORO, PLAINTIFF IN ERROR,

vs.

J. L. LASATER.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS.

This is a case upon a writ of error from the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas, the same being the highest court of law or equity of the said State in which a decision could be had between the plaintiff in error here and the defendant in error here, wherein was drawn the construction of a clause or statute of the United States, to wit: Section 5198, of the Revised Statutes of the United States, and also of the Bankrupt Act of 1898, and this cause is here under the provision of 709 of the United States Revised Statutes.

A suit was brought by J. L. Lasater, the defendant in error here in the Forty-third Judicial District of the said State of Texas against the First National Bank of Jacksboro, plaintiff in error here, to recover from the bank twice the sum of $1,526.80, usurious interest alleged to have been paid to it by said J. L. Lasater, which amount was alleged to have been greater than the legal rate of interest allowed by said State of Texas, growing out of a transaction wherein the said J. L. Lasater and one W. M. Haggard, as partners dealing in cattle, borrowed from the bank the sum of $4,000, on the 30th day of March, 1898, and executed their joint note therefor in the

sum of $4,350, with one A. M. Lasater as surety, due November 15, 1898, with ten per cent interest after maturity, and also mortgaged the property purchased as further security.

Payments were made at various times on said note, as shown by the record on file, pp. 5 and 6, and in November, 1899, the said J. L. Lasater purchased all the interest of said Haggard in the partnership cattle and assumed all liabilities, but nothing was said at the time of said sale to the defendant in error about a claim against the bank for usury.

After said purchase by said J. L. Lasater of the interest of said Haggard he (the defendant in error here) gave a renewal note, with said A. M. Lasater as surety, and on the 15th day of October, 1900, he sold and transferred all of the mortgaged cattle and some other cattle to the said surety, A. M. Lasater, and the latter assumed and agreed to pay the note to the bank in full in consideration of said purchase and sale, which he, the said A. M. Lasater, subsequently did, June 17, 1901.

Defendant in error here on the 19th day of November, 1900, filed his voluntary petition in bankruptcy in the District Court of the United States for the Northern District of Texas, and was duly discharged of all his debts January 7, 1901, six months before the final payment of the last note by the surety, A. M. Lasater.

The defendant in error here, at the time of filing his voluntary petition in bankruptcy as aforesaid, returned no assets to his trustee, and had none, unless this claim against the bank was an asset, and did not tell his trustee in bankruptcy anything about a claim he had against the plaintiff in error here for usury. He said, "I did not tell the trustee about this claim or the creditors." Record, p. 25, of the record.

The facts are all set out in the record on file and will be found pp. 20 to 27.

Upon a trial of the suit before the Judge of the Forty-third Judicial District aforesaid, the court rendered a finding for the plaintiff and judgment against the defendant in error here for costs.

Defendant in error here thereupon appealed to the Court of Civil Appeals of Texas, which court, upon hearing, reversed

the finding and judgment of the district court and rendered a judgment against the plaintiff in error here in the sum of $2,013.80, which sum, as found by said court, is double the amount of interest alleged to have been collected, excepting such sum as was barred by the statute of limitations.

Whereupon the plaintiff in error here applied for a writ of error to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, which had jurisdiction in the case, upon which writ of error the last-named court affirmed the finding and judgment of the Court of Civil Appeals.

A writ of error was thereupon applied for to the Supreme Court of the United States upon the ground that there were Federal questions involved, and upon which the decision of the said Court of Civil Appeals, Second Julicial District, was based, which application was granted.

Two Federal questions are involved, as stated by the Chief Justice of said Court of Civil Appeals for said Second Supreme Judicial District, as shown pp. 6 and 7 of the record.

"1. The construction of Section 5198 of the U. S. Revised Statutes, prescribing a penalty against national banks for knowingly charging and receiving usurious interest.

"2. The construction of the National Bankruptcy Act of 1898 as to the right of a voluntary bankrupt, after he has been discharged, and his estate closed in the bankrupt court, to sue for the recovery of the penalty prescribed by the U. S. Revised Statutes." Record, pp. 6 and 7.

The questions therefore to be decided by this court, as presented by the record, are:

1. Was J. L. Lasater entitled on the facts stated to recover the penalty sued for as usurious interest paid for desiring the continuance of the partnership?

Was J. L. Lasater, by reason of his having assumed the payment of the debt due the bank when he purchased the interest of his partner, Haggard, precluded or limited in his recovery to one-half he would otherwise be entitled to?

Was the payment made by A. M. Lasater, the surety, to be regarded as a payment of the defendant in error here, J. L. Lasater?

2. Was the discharge in bankruptcy of J. L. Lasater, defendant in error here, a bar to his recovery in his action against the plaintiff in error here, viz., the First National Bank of Jacksboro?

The assignments found on page 2 of the record set out clearly the errors relied on to reverse the ruling of the court below, and are substantially as follows:

1. The court erred in holding that J. L. Lasater (the defendant in error here) had the right to sue for and recover in this action the penalty prescribed by Section 5198 of the Revised Statutes of the United States merely because he had been a member of the firm that paid part of the usurious interest, because the penalty is not assignable, and one member of a firm cannot sue to recover a penalty for usurious interest paid by the firm.

2. The Court of Civil Appeals for the Second Supreme Judicial District of Texas erred in holding that defendant in error here could sue for and recover the entire penalty.

3. The court erred in holding that a payment by A. M. Lasater, who was a joint maker of said note, was a payment by J. L. Lasater; but that the same was made under an agreement between appellant and said A. M. Lasater; and that the reception of such payments by said bank from A. M. Lasater was knowingly received by it as a payment from and for appellant (defendant in error here) when said bank was not a party to said agreement and was not informed at the time A. M. Lasater paid said note, together with the alleged usurious interest, that he was making such payment for appellant (defendant in error here), J. L. Lasater.

4. The court erred in holding that said appellant (defendant in error here) could maintain a suit to recover the penalty, as he had filed to voluntary petition in bankruptcy and had been discharged, as under the law all his property, including the claim against the bank, had passed to the trustee in bankruptcy, who was the proper plaintiff in this action, if any one.

5. The court erred in this, to wit: that by the record aforesaid it appears that the judgment of the said Court of Civil Appeals was given for the said J. L. Lasater against the First National Bank of Jacksboro, whereas by the law of the land

the said judgment ought to have been given for the said First National Bank and against the said J. L. Lasater.

It will be seen that the assignments of error set out contain all the specifications relied on by the plaintiff in error here.

The three assignments of error first named may be considered together.

The fourth assignment is a separate proposition.

If the court reverses the ruling of the Court of Civil Appeals of said Second Supreme Judicial District on any one or all of the first four assignments it follows that the fifth assignment is well taken.

The facts as shown by the record are all contained in the statement and finding of the judge of the Forty-third Judicial District, before whom, as above stated, the case was originally tried.

The action of the defendant in error here is based upon a penal statute, viz., Section 5198, U. S. Revised Statutes. It must therefore be strictly construed.

We negative the several propositions we have set out, and our contention is that the defendant in error here had not the right to sue and recover in the action brought by him.

To the first proposition, Was J. L. Lasater entitled on the fact stated to recover the penalty prescribed by the statute?

We contend he had not, for two reasons: First, because, as shown by the record, the defendant in error here and his partner, W. M. Haggard, had paid a part of the usurious interest alleged to have been received by the bank before he had purchased his partner's interest in the partnership effects; therefore, the partner had no ownership in the claim, which he had never divested from himself; and, second, if he had made a valid purchase of his partner's interest in the claim for the penalty prescribed before the bringing of the action upon which the writ of error is based, he had parted with it by making a sale and transfer of the same to his surety, A. M. Lasater.

It should be borne in mind that in all these transactions between the two partners and between the partners and the surety

that the plaintiff in error here had no knowledge of them and was not a party to them.

We claim, therefore, that the defendant in error here and W. M. Haggard, as partners, were jointly liable for the indebtedness of the firm, and were therefore joint makers of the note. If joint makers, J. L. Lasater could not sue for the penalty paid by his partner. If payments were made by both partners, each had an interest in what was paid, and in this case, as shown by the record, payments were made before the sale of Haggard's interest in the partnership to the defendant in error here.

The attorneys for the plaintiff in error here, in preparing their case for the Court of Civil Appeals, made an exhaustive search of the authorities bearing on the several questions presented by the record, and cited the case of the Columbia National Bank v. Rowley, 52 Kan., 394, wherein it was held that under Section 5198 of the U. S. Revised Statutes, which authorizes persons paying usurious interest to a national bank to recover twice the amount of interest paid one of the joint makers of a note on which illegal interest is charged, cannot recover the penalty from the bank when the illegal interest was paid by the other maker.

The same principle is held Timberlake v. First National Bank, 43 Fed. Rep., 231.

The truth is, the defendant in error here, at the time he purchased the interest of his partner, Haggard, did not buy his (Haggard's) right to sue for and recover usurious interest, and Haggard says he did not sell him any such right of action, and that nothing of the kind was mentioned to him by defendant in error. See record, p. 26. If he did not sell such a right, and the defendant in error here did not purchase it, how, then, can he sue to recover something he had never bought and which his partner had never sold?

We claim that the illegal interest, if any was charged and received, being a penalty, could not have been sold; or, if it should be held that the penalty could be bought and sold, the defendant in error here had parted with his interest in it before he brought his suit.

We contend that a penalty cannot be brought and sold as ordinary assets are purchased and transferred.

The defendant in error here was purchasing a penalty when he bought his partner's interest in the cattle. Payments had been made before the sale to J. L. Lasater, and one of the questions asked is whether he can sue for more than one-half of the penalty.

We assert, therefore, that a penalty is never assignable. Paine v. First National Bank, 5 Kan., App. 5-12.

The Supreme Court of Pennsylvania, in the case of the Monongahela National Bank v. Overholt, 96 P. St., 327, which is cited both by the attorneys for the plaintiff in error and the Chief Justice of the Court of Civil Appeals, and to which we shall refer later when we come to argue the second branch of the case in judgment, says: "Rights of action for writs to the debtor's person do not pass, *nor the right to sue for a penalty;* these are not assignable."

Farmers and Mechanics' Savings Co. v. Bozee, 54, S. W. Rep., 339, reported from the Supreme Court of Arkansas, decides that "where a partner assumes to pay a firm debt he cannot plead usury as to his partner's half of the debt."

Matthews v. Paine, 14 S. W. Rep., 463, an Arkansas case, decides that one member of a firm cannot sue to recover usury on a loan either before or after the dissolution following:

McFerrin v. Woods, 3d Bax. 4 (62 Tenn.), 242, which decides that "neither before nor after the dissolution of a firm can one member sue for and recover money individually when the money was borrowed by the firm."

The reasoning of the Court of Civil Appeals upon this branch of the case, we believe, is unsound. The court—Associate Justice Hunter speaking for it—says: "Has the remaining member of a partnership who has purchased all the retiring member's interest in the firm and agreed to pay all the debts the right to maintain this action?" Having propounded this interrogatory, the court decides that as between the partners, one having sold all his interest, the survivor had the right to bring the action as his legal representative.

We believe we have satisfactorily shown that this kind of a claim, being in the nature of a penalty, cannot be assigned. Moreover, the authorities cited by the court do not, in our judgment, sustain its reasoning, as we believe we can show.

The court below further said, p. 33 of the record: "Now, if this claim against the bank was an asset of the firm, and the survivor could recover in case of the death of his partner, the writer at least can see no reason why he may not recover it in case of the retirement of the partner."

There is a broad distinction between the right of a partner retiring from a firm and making a sale of all the ordinary assets belonging to it and one retiring and making a sale of assets which are of a doubtful nature, and which are not real assets, but penalties.

We know that the effects of a bankrupt or an insolvent debtor are held to be assets.

A penalty can hardly be called an asset which is salable.

"A penalty is defined as a punishment imposed by statute as a consequence of the commission of a certain specified offense.

"The term also denotes money recovered by virtue of a statute imposing payment by way of punishment."

Assuming the above definitions are correct, was this claim for usury an asset within the ordinary meaning of the word? As we shall show later on, if it was an asset it belonged to his trustee and not to himself.

Before reaching that question, however, we contend that if the Court of Civil Appeals is correct in holding this to be an ordinary asset, and that the defendant in error was entitled to it as the legal representative, it has been sold twice; first, to J. L. Lasater; second, to the surety, A. M. Lasater, who purchased all of the assets of the surviving partner, and who made the final payment of deferred interest. A. M. Lasater says—p. 27 of the record: "When I bought the cattle plaintiff did not reserve the right to sue for usury." The defendant in error here testified—p. 25 of the record: "At the time I sold the cattle to my uncle, A. M. Lasater, there was not anything said about the usury in the debt he was to pay. I did not reserve my right to sue for it."

It is difficult from the above facts, in view of the authorities cited, upon what hypothesis the court reached its conclusion.

We are aware, however, that the court below rested its decision on the first question in this case on the ground that the

defendant in error here was the "legal representative" of his partner, W. M. Haggard, and as such had a right of action. The Court of Civil Appeals, by Associate Justice Hunter, says—p. 34 of the record: "The 'terms legal representative' have been held to apply 'to all persons who, with respect to another's property, stand in his place and represents his place and represents his interest, whether transferred by them by his act or by operation of law,' citing a number of authorities. We will not enumerate them, but refer to those which have the greater bearing on the case. We have carefully examined all of them, and, in view of the facts presented in the record, we may be pardoned when we say that we do not believe they can be held as precedents to sustain the reasoning of the court below.

The decision in the case of Mutual Life Insurance Co. v. Armstrong, 117 U. S. 998, first referred to, is based upon facts which have no bearing upon the question at issue here. The Supreme Court simply decides that "An endowment policy of insurance payable to the assured or his assigns at a certain date or to his legal representatives if he should die before that time is assignable by the assured when the assignment is not made to cover a speculative risk, and the insurance passes to the assignee, although the assured die within the period."

No one questions that decision. It is sound, but the facts upon which the rule is applied regarding legal representatives of a person are not analagous to the case we are considering.

The case of New York Life Insurance Co. v. Flack, 3d Md., 341, is one where an insured person assigned all his interest to an assignee "for sole and separate use of his wife * * * her executors, administrators, and assigns." The court held, very properly, that due notice had been given to the company and the trustee was enabled to sue. There was no question raised as to who was the legal representative in this case, and it is not an authority to sustain the defendant in error here.

The case of Henderson National Bank v. Alvis, 91 Ky., 146, was a suit where the assignee brought the suit and not the person who had sold and assigned his interest. That is not our case. The facts are not analagous. We contend that if J. L. Lasater was the assignee of W. M. Haggard, then A. M. Lasater became the assignee in turn of the defendant in error.

The case of Louisville Trust Co. v. Kentucky National Bank, 87 Fed. Rep., 143, is not in point. The court held in that case

that the Trust Company had a right of action because it became the general assignee of the person interested; therefore had a right of action. If A. M. Lasater had brought the suit for deferred usurious interest paid then the above-named case might have been in point.

The case of the Louisville Trust Co. v. Kentucky National Bank, 102 Fed. Rep., 442, is the same as that in 87 Fed. Rep., 143 Supra, and it certainly does not sustain the position taken by the Court of Civil Appeals.

The learned judge, however, in the latter hearing, made a declaration which is authority to sustain our contention on the second branch of this case, and to which we make reference now. He said in his opinion a dead person and a bankrupt cannot sue. That is what we shall contend when the second question in this case is reached; that under the facts in the case here the bankrupt could not sue.

We have examined all the remaining authorities cited by the learned justice, and, in our opinion, none of the cases referred to on p. 34 of the record, when the facts in each are considered, can be construed as precedents which should sustain the contention of the defendant in error.

The court below (p. 34 of the record) refers to Taylor v. Sturgess, 5 Tex., 140, where the Supreme Court of that State, in an opinion by Justice Raney, held that "one who has a right of action for double the amount of usurious interest paid by him under Article 3106, Revised Statutes of Texas, can assign the right to maintain the action thereon." The court (p. 34 of the record), after quoting the statute, quotes the language of the Chief Justice, which is as follows: "This statute gives a right of action to one paying usurious interest, and in case of death such a right would become an asset of his estate, subject to administration," citing Railway Co. v. Freeman, 57 Tex., 156.

The latter case is one where a person had cattle killed by the cars, and it was held to be an assignable claim; the court, in deciding the case, declared it assignable, the tort not being one to the person, but to the estate.

That case cannot be regarded as an authority to sustain the claim of the defendant in error here. Taking either horn of the dilemma; if the claim was an assignable asset and could

be bought and sold, he had parted with it and transferred it to A. M. Lasater, his surety (and we have already shown he did not retain it); and if he did not sell it to A. M. Lasater, his trustee in bankruptcy was entitled to it; and, if it was concealed from his trustee, his creditors are now entitled to it. The title in such a case in action certainly cannot lapse.

The court below, Associate Justice Hunter speaking for it (p. 35 of the record), assumed that "the payment made by A. M. Lasater, the surety, who purchased the mortgaged cattle from appellant (defendant in error here), and in consideration thereof agreed to pay the note to the bank, and in discharge thereof executed his own note, which was afterward paid, was in law a payment by appellant (defendant in error here) in property, and the same as a payment in money," citing again Taylor *v.* Sturgis, 5 Tex., 140, and Hough *v.* Hersey, 36 Md., 184; Low. *v.* Pritchard, 36 Vt., 183; Richardson *v.* Baker, 52 Vt., 617; Bank *v.* Bingham, 50 Vt., 105; Nelson *v.* Cooley, 20 Vt., 201 (Vol. 27, Am. & Eng. Enc., 960).

At the risk of repetition, we again say that the payment by A. M. Lasater of the last note paid to the bank was not a payment by the defendant in error here, the latter having parted with it. As a mere question of fact, it could not be so considered, because the defendant in error had been discharged of all his debts in January, 1901, and the note was not paid by A. M. Lasater until six months later. How is it possible to thus hold an asset?

The authorities cited above are none of them based upon facts which make them parallel or analagous to the case at bar.

In parting with the first question to be decided we insist that the court below erred in rendering the decision and judgment of the judge of the Forty-third Judicial District. If the claim was a penalty it could not be assigned, and his partner had never sold it. If not assignable the partner, W. M. Haggard, has the right to sue for one-half of the amount of usurious interest which was paid while he was still in the firm unless barred by the statute of limitations. If assignable, it has been sold to A. M. Lasater, who made the final payment of interest and who has the right to sue if the statute of limitations does not intervene.

We will now take up the second question which must be decided, viz.:

Was defendant in error here discharged in bankruptcy a bar to his recovery in the action brought by him against the plaintiff in error?

Our contention is that he was, and that he ought to have no standing in court.

We claim and insist that all of the property belonging to a bankrupt passes to his trustee.

Under Section 70 of the Bankrupt Act of 1898 the trustee of the estate of a bankrupt * * * shall in turn be vested by operation of law with the title of the bankrupt, except in so far as it is to property which is exempt: 1. All documents relating to his property. 3. Powers which he might have exercised for his own benefit, but those which he might have exercised for some other person. 4. Property transferred by him in fraud of his creditors. 5. Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial proceedings."

Under this act the bankrupt could not conceal anything. Every asset or claim ought to be scheduled and turned over to his assignee.

The learned judge of the Court of Civil Appeals who rendered his opinion reversing the ruling of the judge of the District Court (p. 35) has little doubt but that notwithstanding all the facts the bankrupt, although concealing the claim for usurious interest, after having received his discharge in bankruptcy and being free from all indebtedness, has the right to retake the title to this concealed penalty, or asset, notwithstanding the fact that he never claimed it in his purchase of his partner's interest in the partnership effects, and never retained it in the sale of all his property to the surety.

The Chief Justice of the Court of Civil Appeals, in his opinion on certified question (p. 44), on the contrary, seems to have some doubt on the question, but finally decided in favor of defendant in error here.

The first judge named (Associate Justice Hunter) says (p. 35 of the record):

"There is no merit in appellee's (plaintiff in error here) contention that because of appellant's (defendant in error here)

bankruptcy he cannot recover in this claim." He is, however, of opinion that the trustee in bankruptcy would have been entitled to sue for this claim, citing authorities pro and con, and he says: "But both bankrupt and trustee had bten discharged when this suit was filed. * * * But the fund in this instance was never reduced to possession nor claimed by the trustee or creditors, and it does not lie in the mouth of the usurer to say the appellant (defendant in error here) shall not now recover it. By knowingly violating this plain statute the bank became liable to him for twice the sum of interest so charged and received by it," citing authorities.

We will not review the cases referred to on the question of usury, but we contend that the reasoning of the learned judge is somewhat peculiar. Why was not this claim reduced to the possession of the trustee or claimed by him or the creditors? The answer is easy; because it was concealed, hidden away in the brain of the bankrupt, and the trustee could not know it so as to demand a right to sue on it, and the creditors could not demand that the claim be sued upon and reduced to a judgment for their benefit. The defendant in error says (p. 25 of the record) he did not reserve the right to sue for it, and he never told his trustee that he had such a claim.

The defendant in error further says (pp. 25 of the record): "After I was discharged in bankruptcy I changed my mind about suing for this claim for usury. The reason why I did so was because I needed the money in my business." Very frank and candid! to say nothing more. He was not unwilling to profit at his creditors' expense.

We ask, therefore, Is it possible that a bankrupt can hold any kind or sort of asset or chose in action and conceal it from his creditors and trustee and elect after he had been divested of his title to resume the ownership of it, sue for it, and recover it, and then when his creditors would demand what was their own he could fly in their faces his discharge in bankruptcy? Is the bankrupt the party to elect under such circumstances? Can he make a football of a chose in action, no matter what may be its nature, and turn it to his own benefit in the end? His statements show he was not governed by any higher sense of his duty to his creditors than was the plaintiff in error, whom the judge of the Court of Civil Appeals condemns in plain language.

But the learned judge in saying "It does not lie in the mouth of the usurer," &c., did not repeat or refer to the legal maxims, "He who seeks must do equity," and "A party coming into court must come in with clean hands." Here is an instance of a man concealing a claim which if valid under the facts—and we believe it was not—of right belonged to his creditors, getting a discharge, and being free from all his debts, immediately upon a release from all liabilities bringing a suit to recover what was not his own. He is not in a position to claim benefits until he has purged himself from all fraud.

The authorities, however, relied on by the learned judge regarding the rights of the defendant in error here do not sustain the position taken by him.

Herndon *v.* Davenport, 75 Tex., 462, held that "After bankruptcy proceedings were closed property of the bankrupt not disposed of reverted to the bankrupt. The title which vested in the assignee in bankruptcy cannot be used as an outstanding title to defeat the recovery of the land undisposed of when claimed by the heirs of the bankrupt."

That case is not in point. There was no question of concealment of assets. There was no effort to conceal the title of the land which was in the bankrupt.

The case of Jones *v.* Pyron, 57 Tex. 43, decides that "The mere omission to schedule bankrupt's property constitutes no ground either in law or equity for denying to the heirs of the bankrupt their title on the termination of the proceedings as against parties who have no other ground of attack than failure to schedule it." This is not our case. The facts upon which the decision is based are not analagous.

The case of Connor *v.* Express Co., 42 Ga., 37, cited by the learned justice, is authority favorable to the plaintiff in error here rather than against it. The decision is based entirely on the presumption that the assignee in bankruptcy had a knowledge of the asset, and for some reason did not see fit to control it. The court in deciding the question says: "The presumption is that the assignee as agent of the bankrupt court would not have been discharged leaving this claim undisposed of had there not been some proper reason for leaving it in the control of the plaintiff." There was no question in that case of a doubtful nature; no hint of consealed assets.

We have referred to Section 70 of the Bankrupt Act of 1898, and under this there can be no question but that this claim for usurious interest, if valid and subsisting, passed to the trustee in bankruptcy.

The chief justice of the court below (p. 43 of the record), in his opinion on certified questions, says: "The weight of authority sustains the proposition that when such cause of action as that asserted has accrued, it will, upon bankruptcy of the owner, pass to the assignee in bankruptcy." Then adds: "The authorities cited by the Court of Civil Appeals sustain the proposition that after the close of the administration of the bankrupt's estate and the discharge of the trustee unadministered assets may be recovered by the bankrupt. The decisions of the Supreme Court of the United States make somewhat doubtful the application of a proposition to a case like this, where the trustee had no knowledge of the asset, and where suit is brought recently after the close of the bankruptcy proceedings it may be reopened and further administration had." Here cites authorities, then adds: "The bankrupt law does not contemplate that any assets shall be left unadministered; but it sometimes happens there are such, and when neither creditors nor the trustee asserts right to them it is, we think, proper to regard them, at least as against a wrong-doer, as belonging to the bankrupt."

We believe we have already made it clear that as to the proposition that unadministered assets may be recovered by the bankrupt the authorities cited by the Court of Civil Appeals do not sustain its decision. The learned chief justice and the associate justice both lose sight of the fact when referring to a wrong-doer that the defendant in error has shown himself quite as much of a wrong-doer as the bank from whom he borrowed money.

As to the authorities cited by the learned chief justice, we have examined them carefully and there is no question but that they sustain the proposition that all of the assets of a bankrupt pass to his trustee. If they do, unless the trustee voluntarily returns them to him for good and sufficient reasons, he cannot reinvest himself to their title and use them if he has creditors.

The case of the Monongahela Bank v. Overholt, 96 Penn., 327, heretofore cited, not only sustains the proposition that the assets of the bankrupt pass to the assignee or trustee, but it sustains our contention and decides that the bankrupt has no

right of action after his discharge because the assets had passed and become vested in his trustee. This was a case directly in point to sustain our proposition. The bankrupt, after his discharge in bankruptcy, brought suit to recover usurious interest, and it was held to be no right of action.

The case of National Bank *v.* Trimble, 40 Ohio St., 629, which is also cited, is one which sustains our position. It decides: "If the payee of such interest before action brought was adjudged a bankrupt his assignee in bankruptcy became his 'legal representative,' and as such was entitled to bring the action." The fair deduction from this case is that after being adjudged a bankrupt a person could not again reach out and take in that from which he had been legally divested.

We have already referred to the statement of the learned chief justice of the court below wherein he says: "The decisions of the Supreme Court of the United States make somewhat doubtful the application of a case like this," citing Sessions *v.* Romadka, 145 U. S., 29; Sparham *v.* Yerkes, 142 U. S., 7; Dushano v. Beal, 161 U. S., 513.

An examination of the cases referred to more than make the question doubtful; they really sustain our contention. In Sessions *v.* Romadka, 145 U. S., Justice Brown states that it was possible for a bankrupt court to reopen a case where a patent had been concealed, and cited the case of Clark *v.* Clark, 17 Hon., 315-322. This latter case is an authority which, in our judgment, sustains our view of this question. It has never been, so far as we can learn, overruled. The court held that "Although the bankrupt and his future acquisitions are discharged from all his debts by the certificate in bankruptcy, yet the rights of property which vested in his assignee are still subject to his creditors, and the money arising therefrom is held in trust for them."

This is directly contrary to the position of the Court of Civil Appeals and the position taken by the Court of Civil Appeals for the Second Supreme Judicial District of Texas. The ruling of the two courts below seem to be based wholly upon the wrong-doing of one party, losing sight of the wrong-doing of the other, and turning property back to the wrong-doer who had creditors to whom he owed money and who of right were entitled to his assets.

The case referred to of Sparhawk v. Yerkes, 145 U. S., 1, and Dushane v. Beal, 161 U. S., 513, so far as the facts apply, sustain the position of plaintiff in error. The learned chief justice of the court below, however, puts the question upon the ground that "If such persons (creditors and trustee) do not choose to proceed no good reason is seen why the bankrupt himself should not be allowed to recover," citing Lancey v. Foss, 88 Me., 218. The case cited is decided upon the presumption that the assignee had knowledge of the claim owned by the bankrupt. The court says: "The assignee of a living bankrupt * * * may decline to take or interfere with such property as he deems onerous or worthless." Such is not our case. Answering the learned chief justice, we insist that up until the time the suit was brought neither the trustee nor creditors knew of this secret concealed claim; therefore, the trustee could not sue, and the creditors, knowing nothing of it, could not sue themselves or demand that the bankruptcy proceedings be reopened.

There is a case, lately decided, that is in point and is in line with the authorities, viz.: Monongahela National Bank v. Overholt, 96 Penn. St., 327 supra, and of Clark v. Clark, 17 How., 315. It will be found in American Bankruptcy Reports, Sept., 1904, 164. It is the case of Rand v. Iowa Central Railway Co. It is from the Supreme Court of New York, Appellate Division, First Department, July, 1904. The court held that where, after plaintiff's aleged cause of action accrued, he filed his petition in bankruptcy and was adjudged a bankrupt and obtained his discharge, and in the bankruptcy proceedings did not disclose the claim upon which this action was founded, in consequence of which no trustee in bankruptcy was appointed, the complaint is properly dismissed on the ground that the plaintiff is not the real party in interest, the bankruptcy proceeding having divested him of a right of action." We have no hesitation in asserting that this case is in point and sustains our contention.

So far as we can learn, no court, until the court below, has ever before held that a bankrupt can be divested of his title to assets by bankruptcy proceedings and conceal a part of them; then after his discharge revive his claim and be sustained in it because somebody else has done wrong.

There are other authorities cited and some other questions which might be taken up and discussed, but we deem it unnecessary to further refer to them.

As to the question of morals and right and wrong, we do not insist that two wrongs make one right; but we do insist, that the defendant in error here, because he chose to make a bargain with the bank whereby he expected to make money, cannot buy a non-assignable asset, then sell it, then go into bankruptcy and conceal it, when of right it belonged to his creditors and should have passed to his trustee, then get his discharge and be freed from his debts, then bring a suit to recover that asset which of right does not belong to him, should have no standing in court.

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